

OFFICE OF THE GENERAL COUNSEL  
Division of Operations

December 17, 1971

MEMORANDUM

TO: All Regional Directors, Officers-in-Charge,  
and Resident Officers

FROM: John S. Irving, Associate General Counsel

SUBJECT: Proposed Instructions for Administrative  
Deferral for Prospective Arbitration

As you know, the General Counsel is now preparing instructions to the Regional Offices for the disposition of cases affected by current arbitration and by arbitration agreements. Recognizing the importance of these instructions to future Regional Office operations and to the successful effectuation of the Board's arbitration policy, the General Counsel believes it desirable at this stage in the preparation of these instructions to draw on the substantial reservoir of experience gained by the Regional Offices which frequently handle disputes subject to arbitration. Attached is the most recent draft of the proposed instructions for your review and comment. These proposed instructions have not been approved by the General Counsel and should not necessarily inhibit your comments.

Because there are a substantial number of pending cases affected by the Collyer decision, the General Counsel would appreciate your early review of these proposed instructions and the submission of any views and comments on the subject by December 30. Inasmuch as this memorandum is presently being revised, its contents should be regarded as confidential and should, of course, not be made public.

  
J. S. I.

Attachment

SUBJECT: Arbitration Deferral Policy on 8 (a) (5) Charges

This memorandum is intended to provide guidelines for Regional office handling of Section 8(a)(5) charges to which the Board's policies of deferral for prospective arbitration are applicable.

With the Board's enunciation of a new arbitration deferral policy in Collyer Insulated Wire, 192 NLRB No. 150, a more significant proportion of the 8(a)(5) charges filed in the Regional Offices will be affected by arbitration which is in progress or by a contractual obligation to arbitrate. <sup>1/</sup> Achievement of uniformity and the efficacious handling of these cases will be promoted by the development and consistent application of criteria for identification of cases to which the Collyer policy, or earlier Dubo policy, is applicable and by the formulation of explicit procedures for the handling of these cases. The instructions which follow are intended to serve this function during a period in which the Board is delineating and defining further the full scope of its arbitration deferral policies.

1/ Before the Board's issuance of the Collyer decision, deferral of administrative action for prospective arbitration was based on the policy derived from the Board's decision in Dubo Manufacturing Corp., 142 NLRB 431. In general, that policy pertains to both 8 (a) (3) and 8 (a) (5) charges in which the underlying disputes already are in arbitration or are in a "grievance channel" leading to binding arbitration. In 1967, then General Counsel Arnold Ordman summarized the Dubo policy of deferral for arbitration in saying:

In practice, the Regional Offices, when a charge is pending and the grievance-arbitration procedure is being actively pursued, will defer action on the charge pending the completion of the grievance-arbitration procedure and will encourage active resort to the grievance-arbitration procedure if it appears that there is a substantial likelihood that the utilization of the procedure will set the dispute at rest. /Ordman, Arbitration and the NLRB--A Second Look, 1967 Labor Relations Yearbook, 197 at 202 (BNA)/

As the Board's decision in Collyer does not suggest any modification of the Dubo policy, the application of this policy will be continued in the future.

the Board's decisions and these instructions will provide no clear guidance. Such cases should be submitted/for advice and will provide a basis for further review and refinement of these instructions.

General case handling considerations:

The Collyer decision does not attempt to define the reach of the new deferral policy nor to set out the administrative procedures for its implementation; the Board itself recognized its decision as "a developmental step in the Board's treatment of these problems . . . ." So, at least in the short run, the administration of this policy can only proceed on the basis of deductions and inferences drawn from the circumstances upon which the Board relied in the Collyer case and the incorporated Schlitz decision.

As one long interested in the development and refinement of labor relations policies and practices which are conducive to the expeditious and private settlement of industrial disputes, I much favor the Board's deferral to the arbitral process to the broadest extent consonant with the objectives of the Statute. But in formulating field instructions for the implementation of the Board's Collyer decision I must, as General Counsel of the Board, also consider the generality of the terms in which the Board announced this new deferral policy and the absence of clear predictability of the Board decisions which will follow this "developmental step." These considerations and the finality which attends my dismissal of charges in the exercise of my authority under Section 3(d) of the Act persuade me that in cases raising significant questions about the applicability of the Collyer policy, the preferred course is to allow access to the Board for the authoritative resolution of these questions through Board adjudication and decision.

UNDER THE COLLYER POLICY 2/

I Character Of The Dispute

(A) Type of violations involved

The Collyer policy of deferral for arbitration will be applied only to disputes involving alleged refusals to bargain violative of Section 8(a)(5) of the Act and not to charges alleging violations of other sections of the Act. 3/ Analogous 8(b)(3) violations 4/ in which the circumstances of the dispute might meet the Collyer requirements for deferral should be submitted for advice.

A charging party's gratuitous inclusion of an 8(a)(3) allegation which investigation does not substantiate in a charge sounding principally in Section 8(a)(5) would not preclude deferral

after dismissal of the 8(a)(3) allegation.

(B) The Contractual origin of the dispute

Section 8(a)(5) charges should be deferred for arbitration if a reasonable 5/ construction of the substantive provisions of the agreement between the parties, (other than the grievance and arbitration provisions)

2/ This section of the instructions is confined to a consideration of the "circumstances" relevant to deferral only under the Collyer policy, a policy which is basically premised on a preexisting agreement to arbitrate contractual disputes. Collyer deferral is to be distinguished from deferral under the Dubo policy which is premised on the fact either that binding arbitration is in progress or that the dispute is in the grievance stages of a procedure which leads to binding arbitration. Accordingly, the "circumstances" discussed in this section do not pertain to deferral based on the fact that the grievance-arbitration procedure of the contract is being actively pursued and that this proceeding will likely set the dispute at rest.

3/ The complaint in the Collyer case alleged the violation of Section 8(a)(5) and the principal opinion of the Board made no reference, even by indication, to the applicability of its deferral policy to 8(a)(3) violations. Thus, the principal opinion failed either to endorse or reject Member Brown's express contention that the Board's arbitration deferral policy should be applied to Section 8(a)(3) and 8(a)(1) violations as well as 8(a)(5) violations.

4/ E.G., Westgate Painting and Decorating Corp., 186 NLRB No. 140.

5/ Where the asserted construction of the contract is plainly insubstantial or unreasonable, the dispute would not be considered in fact contractual in origin; therefore deferral would not be warranted, and complaint should issue. Where the (continued on p. 4)

Accordingly, deferral would be appropriate, assuming other requirements for

- in a dispute over working conditions which are, by a reasonable construction of the contract, covered by substantive provisions which refer to these conditions;

5/ (continued) asserted construction of the contract is plainly correct, and the disputed conduct was therefore privileged by the contract, the charge should be dismissed.

In referring in Schlitz to employer action "not patently erroneous" and based on "a substantial claim of contractual privilege" and to "a reasonable claim [asserted] in good faith," the Board seemed to contemplate a contract claim which was neither so compelling as to preclude any conflicting construction or so unconvincing as to suggest bad faith on the part of its proponent.

Member Brown in a similar vein, said, "The Board should not defer where the dispute is not covered by the contract and, therefore, involves the acquisition of new rights. I would reach a different result where the contract is ambiguous. In such a case a party may be exercising an accrued right, and the party's action might be justified by the ultimate interpretation of the contract. Thus, I would defer where a good-faith dispute over the interpretation or application of a contract exists, . . ." (Emphasis added, footnotes omitted)

6/ The Board referred to the contractual origin of the dispute in the Collyer case in various ways. Thus, the dispute was seen to be "essentially a dispute over the terms and meaning of the contract." The dispute "in its entirety arises from the contract between the parties and from the parties relationship under the contract." And "[t]he contract and its meaning in present circumstances lie at the center of the dispute." But perhaps the contractual element of such a dispute was more explicitly identified by the Board when it stated that the question of deferral arises "only when a set of facts may present not only an alleged violation of the Act but also an alleged breach of the collective bargaining agreement subject to arbitration." And in enumerating the factors favoring deferral, the Board said that in the Collyer dispute, which was one eminently suited for resolution by arbitration, "the Act and its policies become involved only if it is determined that the agreement between the parties, examined in light of the negotiating history and the practices of the parties thereunder, did not sanction Respondent's right to make the disputed changes. . ."

In sum, the Board seems to have been referring to a dispute in which issues of substantive contract interpretation would have to be resolved against the respondent as a prerequisite to finding that the disputed conduct violated the Act.

clause is, by a reasonable construction, applicable even though this clause does not contain any explicit reference to the subject matter of the dispute and even though application of this clause might depend on evidence extraneous to the contract, such as the union's waiver in negotiations of future bargaining rights, the past practices of the parties, and the bargaining history. 7/

Deferral would not be appropriate:

- in a dispute over the basic obligation or willingness of the employer to recognize the union; 8/
- in a dispute in which there is substantial question as to the existence of the contract as a whole at the time the dispute arose, e.g., where there is substantial question whether the contract had been agreed to or had been extended or had automatically renewed; 9/
- in a dispute which does not involve a construction of the terms and meaning of any substantive contract provision but which is nevertheless arbitrable pursuant to a provision making all disputes between the parties arbitrable during the term of the contract;

7/ That the Board contemplated the application of deferral policy where evidence extraneous to the contract is relevant to its construction is indicated by the Board's reference to arbitral interpretation of the Collyer contract "in light of its negotiating history and the practices of the parties thereunder . . . ." And one of the issues raised by the Employer's action in the Collyer case included, as the Board framed this issue, the extent to which the more overt contract issues "may be affected by the long course of dealing between the parties."

8/ E.g., William J. Burns International Detective Agency, 182 NLRB No. 50; Ranch-Way, Inc., 163 NLRB No. 116.

9/ E.g., William J. Burns International Detective Agency, *supra*; The Crescent Bed Company, Inc., 157 NLRB 296; Associated Building Contractors of Evansville, Inc., 143 NLRB 678.

are not covered by the contract and which are not subject to an alleged union waiver of bargaining rights which is embodied in the contract.

To the degree it is possible to define and identify separate disputes, deferral policy should be applied on a "per dispute" basis. Thus, where a charge alleges disputes over more than one subject matter and the dispute over one of these matters meets the Collyer criteria and that dispute can be fairly viewed as separable from the remaining allegations of the charge, further action on the allegations pertaining to that dispute would be deferred for arbitration <sup>9A/</sup> unless the remaining allegations of the charge would preclude deferral.

(C) Disputes involving alleged enmity toward employee or union rights under the Act <sup>10/</sup>

Unfair labor practice charges should not be deferred for arbitration where:

- there is credible evidence that the disputed conduct alleged to have violated Section 8(a)(5) was not motivated by legitimate business or economic considerations and that the purported claim of contract privilege was intended to justify or conceal an effort to undermine the union. <sup>11/</sup> (Where, absent

<sup>9/</sup> (continued) The Collyer policy of deferral having been predicated upon the contractual undertaking to arbitrate, the requisite basis for deferral would be lacking where there is substantial doubt as to the existence of the contract as a whole, or the arbitration provisions thereof. Cf. Hilton-Davis Chemical Co., 185 NLRB No. 56; Taft Broadcasting Co., 185 NLRB No. 68.

<sup>10/</sup> The Board relied in Collyer on the fact that "no claim is made of enmity by Respondent to employees' exercise of protected rights." And in the part of the Schlitz case quoted by the Board the situation was characterized as "wholly devoid of unlawful conduct or aggravated circumstances of any kind" and the alleged unilateral action there "was not designed to undermine the Union."

<sup>11/</sup> Whether the employer discussed or offered to discuss a disputed change in working conditions before effectuating the change should be considered relevant to a determination of the employer's motivation in making the change. See (H), *infra*.

<sup>9A/</sup> Cf. The Crescent Bed Co., *supra*.

the union, the matter should be submitted for advice.  
Cf. N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S.  
26 (1967)).

- the disputed conduct, if unlawful, constituted a violation of Section 8(a)(3) and/or Section 8(a)(2) as well as Section 8(a)(5), e.g. an employer's recognition of a rival union while contractually obligated to recognize and bargain with an incumbent bargaining representative (Where a determination of whether the employer violated Section 8(a)(3) or is obligated to reinstate alleged unfair labor practice strikers is dependent on whether the disputed conduct violated Section 8(a)(5), the matter should be submitted for advice. For example, a dispute over an employer's alleged unilateral change of a working condition in breach of the bargaining agreement where the employer discharged employees who struck to protest the alleged unilateral change should be submitted for advice);
- although the disputed conduct itself would warrant deferral, there is credible evidence of other substantially related conduct violative of Sections 8(a)(3) or (1) or conduct violative of Section 8(a)(5) which evidences employer rejection of statutory collective bargaining obligations.

As noted above, a charging party's gratuitous inclusion of an 8(a)(3) allegation which investigation does not substantiate in a charge sounding principally in Section 8(a)(5) would not preclude deferral after dismissal of the 8(a)(3) charge.

Unfair labor practice charges will not be deferred for arbitration unless at the time deferral of the charge is being considered the respondent is willing to submit the dispute to arbitration whether or not any time limits the contract may contain on the filing and processing of the dispute through the grievance and arbitration procedures have expired 12/ or the contract containing the arbitration procedure has itself expired.

Respondent's assertion of its willingness to submit the matter to arbitration need not be formalized or guaranteed in any particular manner. But if the Region decides to defer action on the charge the Region should, in the confirming or formal letter of deferral express its understanding of the Respondent's willingness to arbitrate the dispute not withstanding any contractual time bars or expiration of the contract and its understanding of the Respondent's intention not to contend against

12/ Apparently important to the Board's decision in the Collyer case was the fact that the Respondent "has credibly asserted its willingness to resort to arbitration . . ." But the majority opinion does not make clear whether the time limitations of the contract governing the filing for grievance-arbitration proceedings bear any relationship to the requirement that the respondent be willing to arbitrate the dispute.

The Board retained jurisdiction over the dispute in Collyer -- rather than dismissing the complaint "outright" -- in part because of the contrary state of the law at the time the dispute arose. This might suggest the possibility that in the future, when parties are presumed to know their obligations under the Collyer policy, the Board will dismiss "outright" where the charging party has allowed the time limits to expire without filing for arbitration. At best, however, this possibility was considered speculative.

On the otherhand, dissenting Member Fanning flatly stated that "The time limits . . . have passed . . ." and for this reason he charged that by compelling the arbitration of a grievance no longer contractually arbitrable, the majority disposition of the case "verges on the practice of compulsory arbitration." The majority opinion rejects this contention, saying that it was "merely giving full effect" to the arbitration agreement between the parties, but making no mention of the arbitration time limits of the contract on which Member Fanning based his contention.

It thus appears that the majority of the Board considered the question of time limits on the filing of grievances to have been irrelevant to its decision. It was enough for the Board's purpose that the Respondent was willing to arbitrate despite any time limitations contained in the contract. So viewed the Board's decision indicates that a party which seeks deferral of a charge for arbitration must be willing to waive any arbitration time limitations which the contract may contain.

... dispute through arbitration.

(E) Good faith in the assertion of a contract claim or the willingness to arbitrate

An employer's withholding or failing to assert a claim of contract privilege until a charge is filed and is under investigation would not be considered evidence that the claim is being asserted in bad faith. 13/ However, where an employer first asserts a contract claim or its willingness to arbitrate after complaint issues or where the employer earlier rejected or obstructed timely and appropriate union efforts to resolve the dispute through the grievance-arbitration procedures of the contract, the question of whether the employer's asserted willingness to arbitrate and asserted contract claim would be considered belated and in bad faith should be submitted to Washington for advice.

(F) Disputes over special subject matters

Not suitable for deferral are disputes over a contractual obligation to include in an existing bargaining unit new facilities or operations acquired by the employer. 14/

13/ The Board in Schlitz case discussion twice referred to the Respondent's good faith, first as to Respondent's assertion of a reasonable claim and second as to its belief in its contract right at the time it effected the unilateral change. And the Board characterized the Respondent as "the party which in fact desires to abide by the terms of its contract." These statements were believed to support a view that an employer's undue delay in its assertion of a claim of contractual right is to some extent relevant to a determination whether the claim is asserted in good faith.

It could be argued that an employer's withholding a claim of contract privilege until the charge is filed indicates either that the employer did not in fact act in reliance on the contract and the dispute was therefore not contractual in origin or that the employer deliberately withheld its claim in order to avoid resolution of the dispute through the contract grievance machinery. The Board's decision in the Schlitz case lends some support to this argument. However, the facts of the Collyer case itself militate against this argument. Nothing in that case indicates that during the development of the dispute Respondent asserted any claim of contract right; in the letter Respondent sent to the Union after several meetings with the Union setting out its position on the most significant of the disputed changes, Respondent asserted no claim that the change was privileged by the contract.

14/ Member Brown, whose concurrence was necessary to the majority decision in Collyer, expressed reservations about surrendering unit determinations to private parties. His reservations would probably (cont. on p. 10)

and necessary to its evaluation and processing of grievances, even though arbitrable under the particular bargaining agreement, should not be deferred for arbitration. 15/ However in instances in which the underlying grievance is already before an arbitrator, the question of deferral of the dispute over the request for information should be submitted to Washington for advice.

to Washington  
Also to be submitted/for advice are cases in which the employer's disputed action resulted in substantial or total elimination of the bargaining unit.

(G) Skills required in the resolution of the dispute

The determination of whether a dispute should be deferred for arbitration should not be based on any attempted assessment of the "special skill and expertise" which would be required in the resolution of the dispute. 16/

14/ (continued) include questions of accretion to the bargaining unit, even though the parties had resolved the question by executory agreement.

15/ The Court's decision in N.L.R.B. v. Acme Industrial Co., 385 U.S. 432 64 LRRM 2069, was believed to weigh against deferral for arbitration in disputes over a union's request for grievance information.

An employer's denial to a union of information relevant to grievance processing might also be viewed as precluding the "quick and fair means" the Board referred to for resolving disputes and as evidencing a penchant on the part of an employer for obstructing the efficient working of the arbitral process.

16/ While the Board said, ". . . . disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships . . . .," the Board seems to have been describing an advantage of, rather than a condition precedent to, deferral for arbitration. While the Board may have seen "disputes such as these" as particularly suited to the special skills of arbitrators, the Board does not suggest, and it would be anomalous to infer, that the simplicity of the issues involved in the dispute would weigh in favor of Board assertion of jurisdiction.

An employer's failure to discuss, or to offer to discuss, a disputed change in working conditions before or after effectuating them 17/ does not necessarily preclude deferral of the resulting charge for arbitration. 18/

17/ An employer's having disoussed or offered to discuss such a change would bear on a determination of the employer's motivation in making the change, as well as on whether the employer made the change unilaterally. The fact that the employer discussed or offered to discuss the change would not, of course, bear on the question whether the change constituted a midterm modification of the contract violative of Section 8 (d).

18/ In the Schlitz case the Board did cite Respondent's having "offered to discuss the entire matter with the Union prior to taking such action." As that case involved an alleged modification of the contract in violation of Section 8(d)--to which an offer to discuss the change would not have been relevant--it appears that the Board considered the offer relevant to the deferral question alone.

However, in Collyer the trial examiner found, and the Board noted, that one of the disputed changes in working conditions found unlawful by the examiner had been discussed with the Union, but the other "had not been made the subject of bargaining between the Union and the Employer." Nevertheless, the Board drew no distinction between the two changes made by Respondent in deferring the case for arbitration. It would seem, therefore, that the Board does not consider a respondent's failure to discuss an allegedly unlawful change with the union a bar to deferral of the dispute for arbitration.

Unfair labor practice charges will not be deferred for arbitration unless the applicable contract procedures for the resolution of disputes provides for "arbitration." In determining whether the person, persons or body provided in the contract for the last-stage resolution of the dispute are arbitrators or arbitral bodies, and that the contract therefore provides for "arbitration", the criteria for this determination which have been developed by the Board in the application of the Spielberg 18A/ policy should be employed. Thus, the absence of a neutral member on a bipartite panel would not necessarily preclude deferral. 19/ But where, in addition, it appears that all members of the bipartite panel are or would be arrayed in interest against the charging party, deferral would not be appropriate. 20/

(B) Exclusivity of arbitration as the means of resolving the dispute 21/

An unfair labor practice charge will not be deferred for arbitration (under the Collyer policy 22/) unless the contract constitutes

19/ Denver-Chicago Trucking Co., 132 NLRB 1416; Modern Motor Express, Inc., 149 NLRB 1507.

20/ Roadway Express, Inc., 145 NLRB 513; Youngstown Cartage Co., 146 NLRB 305.

21/ As employed herein the term "exclusive" refers only to a contractual prohibition against the unilateral use of any means other than the designated contract arbitration procedures for the resolution of covered disputes. That is, if an aggrieved or complaining party to the contract wishes to seek redress in a dispute with the other party, the contractual disputes procedures is characterized as "exclusive" if the contract prohibits the aggrieved party from attempting to impose its position on the other party by any means other than resort to that procedure. "Mandatory" refers only to the contractual obligation of either contracting party to enter into the arbitration of a dispute when the other party invokes the arbitration procedures. "Binding" refers to the contractual obligation of both parties to accept and abide by the result reached in the resolution of a dispute through the designated procedure

22/ Particularly in this examination of the contractual provisions bearing on deferral for arbitration, it should be kept in mind that this section of these instructions (pages to ) is confined to a consideration of the "circumstances" or "conditions" for deferral under the Collyer policy; these "circumstances" are not relevant to deferral

which are necessary

(continued on next page)

18A/ Spielberg Manufacturing Co., 112 NLRB 1080.

Exclusivity of the arbitration provisions of the contract will be determined on the basis of the express terms of the contract and fair inferences drawn from these terms which make it reasonably clear that the parties intended that as to covered disputes either party, or at least the charging party, is proscribed from imposing its position in the dispute on the other party through any means other than the grievance and arbitration provisions.

- 22/ (continued) under the Dubo policy. Collyer deferral policy applies to disputes in which neither party has initiated proceedings which will lead to arbitration; deferral under the Dubo policy, on the other hand, is predicated on the fact that procedures which will lead to binding arbitration are being actively utilized.
- 23/ In examining the contract provisions of the Collyer case the Board found that "the parties intended to make the grievance and arbitration machinery the exclusive forum for resolving contract disputes," on the basis of contract provisions which are quite explicit on this subject. The Board in beginning its discussion, accepted the contention that the dispute should be resolved in the manner which "that contract prescribes." In dealing with the Spielberg issue, the Board observed that the Collyer contract "unquestionably obligates each party to submit to arbitration any dispute arising under the contract . . . ." In rejecting the "compulsory arbitration" contention of Member Fanning, the Board asserted that it was merely giving effect to "voluntary agreements to submit all such disputes to arbitration rather than permitting such agreements to be sidestepped and permitting the substitution of our processes, a forum not contemplated by their own agreement." Speaking generally about deferring for arbitration procedures, the Board referred to parties which have "contractually committed themselves to mutually agreeable procedures for resolving their disputes . . . ."

In its final statement of its conclusions the Board believed it to be "consistent with the fundamental objectives of Federal law to require the parties here to honor their contractual obligations rather than . . . to ignore their agreed upon procedures.

stated in the contract, as in the Collyer case, it may also be inferred from the imperative or categorical tenor of the provision for submission of disputes to arbitration (e.g., "Disputes shall be . . .," "All disputes will be . . .," "Disputes must be . . .") in conjunction with the fact that the result of the arbitration is made final and binding. <sup>24/</sup> These "Lucas Flour" arbitration agreements are therefore to be treated for deferral purposes as if they expressly provided that arbitration shall be the exclusive method for resolution of contract disputes between the parties.

The "Lucas Flour" inference of exclusivity would also be warranted where, instead of expressing a general and inclusive obligation to submit <sup>otherwise unresolved</sup> disputes to binding arbitration, the contract requires that if either party demands arbitration of a dispute the other party will enter into and be bound by the arbitration proceeding (i.e., the contract contains provisions for mandatory and binding arbitration but does not expressly provide for/exclusivity/ <sup>the of arbitration).</sup> <sup>25/</sup> However, where an arbitration procedure is

<sup>24/</sup> In Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, the contract provided that differences between the parties "shall be submitted" to arbitration which shall be "binding," but it did not expressly provide that arbitration was to be the exclusive method of settlement. The Court characterized the contract as one which "expressly imposed upon both parties the duty of submitting the dispute in question to final and binding arbitration." In ruling that a strike over the dispute violated this contract, notwithstanding the absence of a no-strike clause, the Court found applicable a doctrine applied by lower courts to disputes which "a collective bargaining agreement provides shall be settled exclusively and finally be compulsory arbitration . . ." (emphasis added) The Court rested its finding that the strike violated the union's contractual obligation on the fact that the dispute was one which the union "has expressly agreed to settle by final and binding arbitration proceedings."

The Court's opinion clearly supports the view that the exclusivity of a contractual provision for arbitration may be inferred from a contractual requirement that the disputes be submitted to arbitration and a contractual provision that the arbitral decision shall be final and binding on the parties.

<sup>25/</sup> This conclusion is based on the view that an obligation to submit disputes to arbitration at the demand of the other contracting party is tantamount to, or the equivalent of, a general obligation to submit all disputes to arbitration, for the purposes of application of Collyer deferral policy. Accordingly, a mandatory and binding arbitration procedure would be construed to be an exclusive procedure.

otherwise  
unresolved

the "Lucas Flour" inference of exclusivity would not be warranted. 26/

(C) Encompassment of the dispute by the arbitration provisions

To warrant deferral the dispute underlying the unfair labor practice charge must be encompassed by the arbitration provisions of the contract; that is, the subject matter of the dispute under consideration subjects which the must be included in the contract makes /arbitrable. 27/ This determination must be based on the language of the agreement and the inferences which may be fairly drawn from this language. It is not necessary that these provisions encompass all potential disputes arising under the contract; it is enough that the particular dispute in question is encompassed by these provisions. 28/

The willingness of the respondent to arbitrate the dispute in question or the expiration of the contractual time limits would not be considered relevant to the determination of whether the dispute is encompassed by the arbitration provisions; the determination to be made is whether the charging party has contractually undertaken to arbitrate the kind of dispute which is the subject of the unfair labor practice charge.

(D) The binding character of the arbitration procedure

Unfair labor practice charges will not be deferred for arbitration if the arbitration provisions of the contract do not make the results

26/ Under an arbitration procedure mandatory at the option of the charging party, the charging party has not "expressly agreed to settle /disputes/ by final and binding arbitration proceedings." And while the procedure may guarantee the availability of arbitration to the charging party, that fact would not warrant deferral inasmuch as the Collyer deferral policy is predicated not on the availability of arbitration to the charging party, but on the charging party's having prospectively and voluntarily obligated itself by contract to seek redress by no means other than arbitration in disputes with the respondent.

27/ See United Steelworkers of America v. Warrior and Gulf Navigation Company 363 U.S. 574, at 582, where the Supreme Court stated: "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

Among the circumstances relied on by the Board in Collyer was the fact that the arbitration clause was "unquestionably broad enough to embrace this dispute." While the term "unquestionably" might suggest that a high degree of certainty should be required in determining whether the dispute is embraced by the arbitration provisions, the Board's use of that term was believed merely to reflect the particular facts of that case.

28/ Cf. Hoffman Beverage Co., 163 NLRB 981; Morton Salt Co., 190 NLRB No.32.

parties. 29/ The term "binding" is considered to refer to a contractual obligation to abide by the terms of the arbitration award or decision, which obligation may be inferred even in the absence of the specific term "binding." Contractual reference to a party's right to judicial review of an award (as well as "case law" or statutory right to such review) would not be considered inconsistent with a determination that the award is binding on the parties.

Contracts which make mandatory or exclusive arbitration a pre-requisite to the resort to other means for resolution of a dispute, most often strikes, should be submitted to Washington for advice.

(E) Mandatory arbitration--availability of arbitration to the charging party

Deferral of an unfair labor practice charge for arbitration is not warranted if the contract does not compel arbitration of the dispute in question at the unilateral instance of the charging party. 30/

29/ The basic premise of the Collyer decision--enforcement of voluntary contractual undertakings to arbitrate contract disputes-- could be argued to warrant deferral for arbitration even though it is not binding on the parties. However the contract in Collyer made the arbitrator's decision "final and binding on the parties," a fact mentioned by the Board in its discussion. And the concept of arbitration to which the Board referred throughout its decision seemed to assume implicitly the obligation of the parties to honor the arbitral result. Indeed, the word "resolve," which the Board frequently used in various forms connotes a degree of finality which inheres in a binding arbitration award.

only

30/ It is clear that in speaking of arbitration provisions which are available for the resolution of contract disputes, the Board referred to arbitration provisions under which the charging party has the right to compel the other party to arbitrate the dispute in question. For example, the Board said that the contract in the Collyer case "unquestionably obligates each party to submit to arbitration any dispute arising under the contract . . ." And in closing its discussion, the Board observed that "After Boys Market it may truly be said that where a contract provides for arbitration, either party has at hand legal and effective means to ensure that arbitration will occur."

While the Board referred to the obligation of "each party" to submit contract disputes to arbitration, it did not take cognizance of contracts under which, as is common, only the union can compel arbitration, the Board's broader rationale warrants deferral even though only the union can compel arbitration (assuming also that vis-a-vis the union the arbitration provisions meet the test of exclusivity).

though the contract gives only an individual employee or group of employees the right to present arbitrable grievances if the disputed action of the employer is prejudicial to the interest of individual employees. Where the disputed action is prejudicial to the interests of union alone, and not to the interests of individual employees, and the contract provides for the filing of arbitrable grievance only by employees, the matter should be submitted to Washington for advice.

(F) Circumstances impeding quick and fair arbitral resolution of dispute

In cases in which a substantial claim is made that for pragmatic, rather than formal contractual reasons, the arbitration procedures do not in fact afford the charging party what the Board referred to as a "quick and fair means" for resolving the dispute, the matter should be submitted to Washington for advice. Such claims might be predicated on a substantial number and backlog of pending arbitration cases, the undue cost of these procedures and the relative disparity of the financial resources of the disputants available for this purpose.

III Relationship Between The Parties To The Dispute

(A) The history of the bargaining between the parties

Deferral of an unfair labor practice charge for arbitration is not warranted in instances in which substantial evidence demonstrates that the relationship between the parties has not been "successful" and "productive" and that the parties have not "mutually and voluntarily resolved the conflicts which inhere in collective bargaining." 31/

This determination of the quality of the relationship may be based on unfair labor practice findings and settlements, Section 301 suits, strikes and lockouts, as well as the arbitration experience of the parties, including the willingness with which the respondent has carried out past arbitration awards against it without forcing the other

charge, the weight given such evidence should be diminished in direct relation to the remoteness in time of the conduct and by evidence of an intervening improvement in the relationship. However, where a substantial issue is raised concerning the quality of the relationship, the matter should be submitted to Washington for advice if deferral is dependent upon the quality of the relationship.

Where a dispute arises during the first contract between the parties and there has been little grievance and arbitration experience under that contract and no history of bargaining between the parties in any other unit, the matter should be submitted to Washington for advice if deferral is dependent upon the duration of the relationship. Such a dispute might exist where the employer succeeded to and accepted the bargaining agreement of a predecessor employer.

(B) Employer enmity generally to employee exercise of rights guaranteed by the Act

Deferral is not warranted where there is substantial evidence of a history of employer violations of the Act of a kind which demonstrates deliberate interference with the right of employees to engage in protected concerted activity or which demonstrates deliberate

31/ In characterizing instances in which deferral is warranted the Board spoke of "established bargaining relationships" and described the Collyer relationship as a "long and productive" one in which the parties "for 35 years, mutually and voluntarily resolved the conflicts which inhere the collective bargaining." In the Board's quotation from the Schlitz case it was recounted that the parties had "an unusually long established and successful bargaining relationship." Earlier in the Schlitz opinion the Board, in explaining its refusal to exercise jurisdiction, pointed out testimony which disclosed "many years of a satisfactory strike--free working relationship."

are imposed by the Act. 32/ This evidence may include unfair labor practice findings and settlements without regard to the limitation of Section 10(b) but, again, the weight given this evidence should be diminished in direct relation to its remoteness in time and to intervening improvement in the relationship.

#### PROCEDURES FOR ADMINISTRATIVE DEFERRAL FOR PROSPECTIVE ARBITRATION

##### I Procedural Implications of the Collyer decision

The Board did not explicate its views as to the manner in which deferral policy should be administratively implemented at case handling stages prior to Board decision. However, the Board's rationale and its comments about, and manner of, disposition of the Collyer complaint are believed to warrant adoption of the following basic premises for the development of case handling procedures applicable in cases in which the question of deferral for arbitration is raised:

1. The Regional Office should not participate in the framing of the dispute between the parties by raising the question of contract defenses and deferral for arbitration in the investigation of the charge. The Collyer aspects of a refusal to bargain charge will be considered and investigated if and after either party has raised with the other party or the Region the question of whether the conduct alleged to violate the Act was privileged by the collective bargaining agreement or whether the charge should be deferred for arbitration, or if the merits of the charge are clearly dependent upon an interpretation of the contract.
2. If a charge pertains to a dispute to which the Collyer policy of deferral for arbitration is applicable, further proceedings on the charge will be deferred for a suitable period to allow the parties an opportunity to resort to the arbitral process;

responsible for the failure of the parties to resort to arbitration (and the dispute has not been otherwise settled), the Region should reactivate and issue complaint on the unfair labor practice charge;

4. If, after a charge has been so deferred, the charging party is responsible for the failure of the arbitral process to function (and the dispute has not been settled) the charge should be dismissed;

5. Wholly apart from the question of deferral for arbitration under the Collyer policy, deferral of action on an unfair labor practice charge will continue to be the appropriate course under the Dubo policy where the grievance-arbitration procedures of the contract are being actively pursued if it appears that the utilization of these procedures will set the dispute at rest.

## II Initial Disposition of Charges 32A

### (A) Investigation and determination of the merits of the charge

The Region should consider whether to defer action on an unfair labor practice charge for arbitration only after the charge has been fully investigated and the Region has determined that, <sup>aside,</sup> arbitration deferral policy <sup>^</sup> the charge would warrant issuance of a complaint. The Region may include in the investigation of a charge evidence bearing on both the merits of the charge and on the question of deferral for arbitration, in order to avoid the duplication of effort and delay which would in some cases be occasioned by the separate, successive investigation of these two aspects of the charge. The Region should nevertheless determine the merits of the charge before considering deferral of the charge for arbitration and should dismiss charges which it finds to be lacking in merit.

Cases should be submitted to Washington for advice on the issue of arbitration deferral only if the merits of the charge have been fully investigated and the Region has found the charge to be otherwise meritorious or <sup>if</sup> the Region seeks advice on the merits of the charge as well.

32A/ A schematic of Section II is attached as an appendix.

32/ The Board pointed out in Collyer that, as in Schlitz, "no claim

(B) Disputes subject to current grievance-arbitration proceedings

If, after the Region has determined that a charge has merit, it appears that a grievance-arbitration proceeding is being actively pursued and that this proceeding is likely to settle the dispute underlying the charge, 33/ the Region should defer further action on the charge under the Dubo policy.

Such deferral is appropriate where (1) the dispute is currently set for, or in in, arbitration; (2) the parties have agreed to arbitrate the particular dispute in question; or (3) either party had filed suit, or secured an order, to compel arbitration of the underlying dispute; or (4) the charging party has filed a grievance under a contractual procedure which culminates in the binding arbitration of unresolved grievances.

Upon ascertaining that one of the above described situations obtains, the Region should inform the parties that the charge is being deferred for arbitration on the basis of the Board's decision in the Dubo case.

Q However, if it appears that in the last described situation above, the charging party filed the grievance (and processed it to the extent necessary to prevent extinction of its contract claim) merely to preserve its rights under the contract pending a determination of whether complaint will issue on its charge and the charging party does not intend to pursue further the contract grievance in the event complaint issues, then the charge should not be deferred under the Dubo policy and should be processed in accordance with the following instructions, without regard to this pro forma filing of the grievance.

33/ Arbitration, as referred to in the subsection (B), is confined to arbitration which is final and binding on the parties.

(C) Encouragement of arbitration

If a charge is found to be meritorious, and the underlying dispute is not the subject of a current grievance-arbitration proceeding, then the Region should issue complaint on the charge unless there is available to the parties a procedure for binding arbitration of the dispute and (1) either party has raised with the other or with the Region the contention that the collective agreement privileged the allegedly unlawful conduct, or (2) the respondent has contended that the charge should be dismissed or deferred on the basis of the arbitration provisions of the contract, or (3) the merits of the charge are clearly dependent upon an interpretation of the agreement between the parties. In the event any of these situations obtains, then the Region should encourage the parties to submit the dispute to arbitration (if the Region in its discretion believes that there is significant likelihood that the parties would be willing to do so). If, as a consequence of this encouragement, the parties voluntarily undertake to arbitrate the dispute, the Region should inform the parties that the charge is being deferred for arbitration on the basis of the Board's decision in the Dubo case

(D) Investigation of the circumstances pertaining to deferral under the Collyer policy

If a charge has been found to be meritorious and if the underlying dispute is not the subject of a current grievance-arbitration proceeding and if any of the situations (1) through (3) described in (C), above, obtains but the parties do not voluntarily undertake to arbitrate the dispute, or

If a charge has been found to be meritorious and it is only the subject of a mere pro forma filing of a grievance (which the charging party does not intend to pursue to arbitration if complaint issues on its charge), then:

The Region should conduct or complete its investigation of the "circumstances" which are relevant to deferral for arbitration under the

the fact of this investigation and of their opportunity to present evidence and views on the subject

The order in which the Region investigates the "circumstances" bearing on deferral under Collyer is left to the discretion of the Regional Office. In the interest of minimizing the extent of this investigation, the Region should bear in mind that at the point at which this investigation reveals a circumstance or circumstances which would preclude deferral, the investigation of the remaining "circumstances" may be discontinued and the complaint may be issued absent settlement. Where the dispute is the subject of a grievance filed pro forma (and the charge had for that reason not been deferred under the Dubo policy) the "circumstances" which would warrant or preclude deferral under the Collyer policy are the same as they would be in the absence of the grievance proceeding.

In determining whether deferral is warranted, the Region should initiate and assume responsibility for investigating and considering the "circumstances" which would establish prima facie warrant for deferral. These "circumstances" include the existence of a contract between the parties; the existence of contract provisions which could reasonably be argued to privilege the disputed conduct; the existence of contractual provisions for arbitration which would encompass the dispute, which are exclusive, and binding, and which make arbitration available to the charging party; the fact that the dispute does not concern a special subject matter not suitable for deferral; and the respondent's willingness to arbitrate.

The Region should also consider such evidence as is already in its possession which pertains to the remaining "circumstances" relevant to the question of deferral. This evidence may include Regional

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34/ Charges which have been reactivated (as provided in III (A) below) after deferral under the Dubo policy, are also to be processed in accordance with this instruction.

findings or settlements and evidence already obtained in the investigation of the subject unfair labor practice charge pertaining to employer enmity and the duration and quality of the relationship between the parties. The Region should investigate and consider any other evidence pertaining to the history of the relationship, to employer enmity, to the employer's good faith in its assertion of a contract claim or its willingness to arbitrate and to pragmatic unavailability of arbitration to the charging party only when the charging party has contended against deferral on the basis of this evidence and has made reasonable efforts to secure and present this evidence to the Region.

(E) Communication to the parties of the decision to defer under Collyer

If, on the basis of its investigation and consideration of the "circumstances" pertaining to deferral of action on the charge for arbitration under the Collyer policy, the Region determines that deferral is appropriate, the Region should orally inform the parties of that decision. In the event the charging party, upon being so informed, objects to deferral of action on its charge for arbitration or requests that it be informed in writing of the bases upon which this decision was reached, the Region should send to the parties a letter setting forth:

1. The Region's understanding that respondent is willing to arbitrate the dispute which is the subject of the charge notwithstanding any contractual time limitations on the filing of grievances or the initiation of arbitration or the expiration of the contract and that the respondent does not intend to argue before the arbitrator that the dispute is not arbitrable under the contract:

deferral of the charge for arbitration is warranted;

3. the Region's intention of defer action on the charge in the absence of the charging party's notification of the Region in writing within 7 days that it does not intend to seek arbitration, upon the receipt of which notification the Region would dismiss the charge;

4. the Region's intention to inquire of the parties as to the status of the dispute in approximately 90 days from issuance of the deferral letter and the Region's willingness to accept and consider at that time or earlier any request and supporting evidence from either party for the dismissal of the charge, the continuation of deferral of action on the charge, or the issuance of complaint.

If the Region receives the notification from the charging party referred to in item 3 of the letter the Region should issue a dismissal letter the contents of which consists of the above letter and the fact of the charging party's notification of its intention not to arbitrate.

In the event the charging party, upon being orally informed by the Region of its decision to defer action on the charge for arbitration under the Collyer policy, does not object to the deferral and does not request that it be informed in writing of the bases upon which this decision was reached, the Region should confirm its having so informed the parties by a letter like that described above but from which item 2 has been omitted. If, after sending such a confirming letter,

to in item 3 in the letter, the Region should issue a dismissal letter the content of which consists of the bases on which the Region concluded that deferral of the charge for arbitration was warranted and the fact of the charging party's notification of its intention not to arbitrate.

### III Handling of Deferred Charges Before Issuance Of An Arbitration Award

#### (A) Charges deferred under the Dubo policy

After the Region has deferred further action on a charge for arbitration under the Dubo policy (as provided in II (B) and (C), above), the Region should inquire periodically concerning the status of the grievance or arbitration proceeding.

Where, as a result of such an inquiry or of a party's having brought the matter to the attention of the Region, it appears that the grievance-arbitration proceeding will not result in an arbitration award which resolves the dispute underlying the deferred charge and where the charging party desires the issuance of a complaint, the Region should

reactivate the charge and issue complaint or defer action on the charge under the Collyer policy in accordance with instruction II (D), above. 35/

In the event this inquiry reveals that respondent has interfered with or obstructed the submission of the dispute to arbitration by reliance on contractual time bars to arbitration, by refusing to participate in preparation of the submission or to select an arbitrator, by taking the position that the dispute is not arbitrable, or otherwise, the Region should issue complaint on the charge after giving the respondent an opportunity to enter into a settlement of the charge.

35/ In assessing the "circumstances" pertaining to deferral of such a reactivated charge under the Collyer policy (and particularly in assessing the employer's "good faith," as provided at I (E), above), the Region should give due weight to the circumstances which resulted in discontinuance of the grievance-arbitration proceeding short of issuance of an award resolving the dispute.

action on a charge deferred under the Collyer policy the Region

should proceed in accordance

in  
with the above instruction if, the Region's discretion, the request warrants the Region's inquiring as to the status of the dispute at that time.

(B) Charges deferred under the Collyer policy

About 90 days after issuance of the deferral letter provided for in II (E), above, the Region should inquire of the parties as to the status of the dispute which has been deferred for arbitration and as to the parties' efforts to resolve this dispute. If the information available to the Region does not adequately reveal the status of the dispute because either or both parties are dilatory or uncooperative in their response to the Region's inquiry, the Region should, as part of its inquiry, issue either (1) notice to show cause why the charge should not be dismissed or (2) notice to show cause

why complaint should not issue, whichever in the Region's discretion is the more appropriate in the circumstances.

In the event this inquiry reveals that the parties are actively engaged in efforts to settle or arbitrate the dispute, the Region should notify the parties in writing that having reviewed the status of the dispute underlying the charge, the Region has decided to continue the deferral of action on the charge for another 90 days.

In the event this inquiry reveals that the charging party has not made, or is no longer making, reasonably prompt efforts to settle or to arbitrate the dispute, the Region should dismiss the charge, issuing a dismissal letter which incorporates the original deferral letter, the bases on which the Region originally decided to defer action on the charge (if such bases were not included in the original deferral letter) and the present circumstances upon which the Region relies in deciding to discontinue deferral and to dismiss the charge.

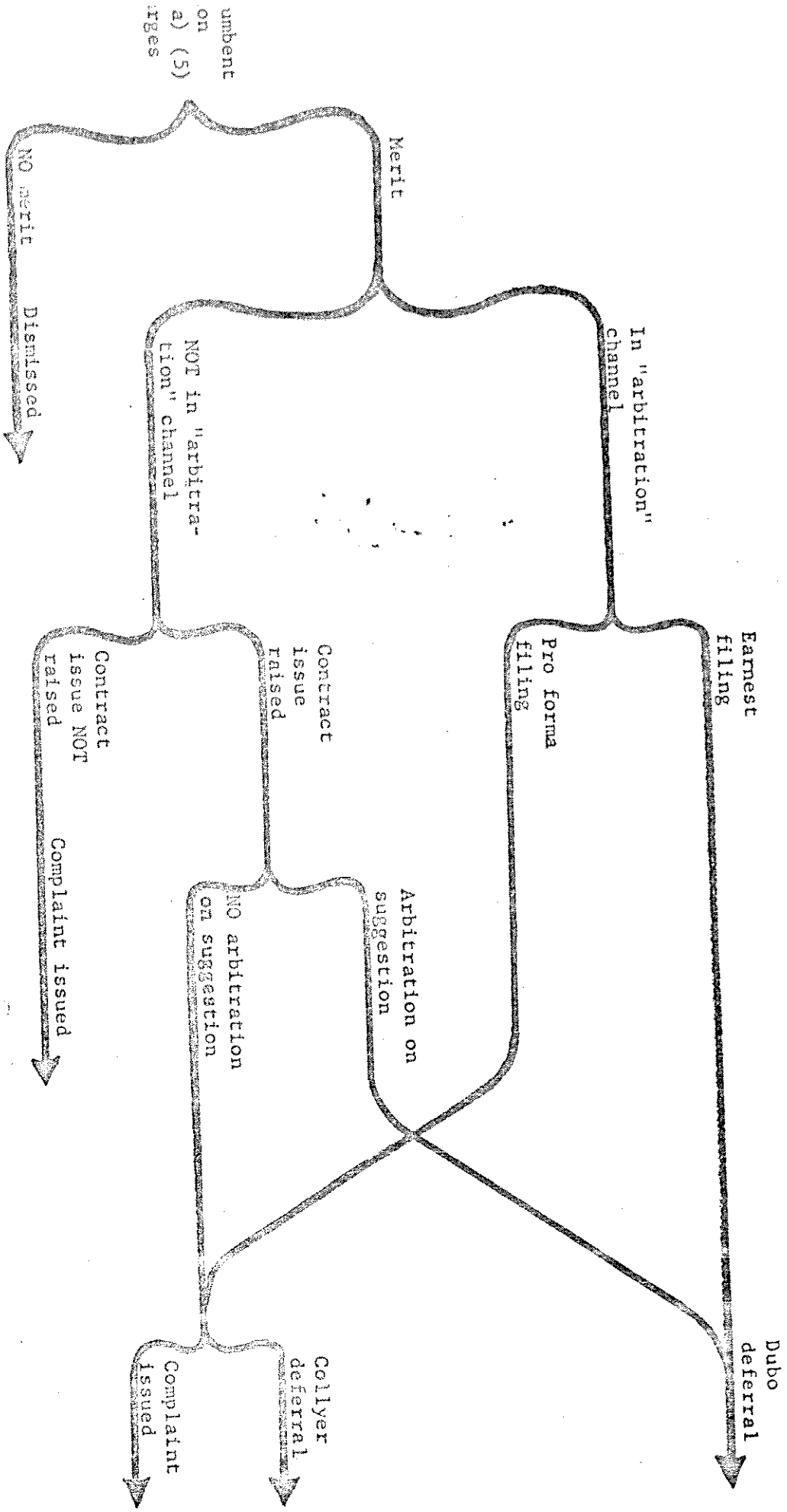
tration by reliance on contractual time bars to arbitration, by refusing to participate in preparation of the submission or selection of an arbitrator, by taking the position that the dispute is not arbitrable, or otherwise, the Region should issue complaint on the charge after giving respondent an opportunity to enter into a settlement of the charge.

#### IV Handling Of Charges Deferred Under Either Collyer or Dubo After Issuance Of An Arbitration Award

When the Region's inquiry under II or III, above, or the charging party or the respondent brings to the attention of the Region an arbitration award resolving the dispute underlying the deferred charge and when the charging party desires that complaint issue, the Region should determine whether the award meets the standards for deferral to such awards under the Speilberg doctrine. If the award does not meet these standards, the Region should issue complaint after giving the respondent an opportunity to settle the case. If the award does meet the Spielberg standards, the Region should dismiss the deferred charge on that ground, where the charge was deferred under the Dubo policy. Where the charge was deferred under the Collyer policy, the dismissal letter should consist of the bases on which the Region found the award to meet the Spielberg standards, the original deferral letter, and the bases on which the Region originally decided under the Collyer policy to defer action on the charge (if such bases were not included in the original deferral letter).

#### V Litigation Of The Collyer Deferral Question

The Region should not at hearing enter objections to the introduction of evidence by respondent on Collyer issues (and shall, where necessary, support respondent's right to submit evidence relevant and material thereto). However, the Region should respond with all available evidence which distinguishes Collyer and argue against deferral if it has been administratively determined that the unfair labor practice



Schematic of Procedures in Section II  
of Deferral Policy Instructions